No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* SENATOR SHELDON WHITEHOUSE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is United States Senator Sheldon Whitehouse of Rhode Island. As a legislator and member of the Senate Committee on the Judiciary, *amicus* has a front-row view of both the virtues of America's constitutional democracy and the hazards of growing corporate influence over its democratic institutions, including the judiciary.

As a former state attorney general and United States Attorney, *amicus* holds a deep respect for the role of the jury in the American justice system. *Amicus* files this brief to draw attention to the Court's steady march of decisions eroding the Constitution's Seventh Amendment protections and to warn of the Court's perilous destabilization of its own institutional reputation.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

For years the civil justice system has suffered under a sustained attack by corporations and billionaires, and by the front groups they stand up to mask their identities in this effort. These are powerful entities, with enormous sway in the legislative and executive branches. They resent the plane of equality they must stand on in courts, and fear the disclosures that document discovery, depositions, and testimony under oath produce. They therefore desire to reduce their exposure to courtrooms.

Over the past decade, a predictable conservative majority of the Supreme Court has handed down an accommodating string of 5-4 decisions closing off ordinary citizens' pathways to the courtroom. Corporate victories at the Supreme Court have undermined civil litigants' constitutional right to have their claims heard before a jury of their peers, and have whittled to a nub the protective role courts and the jury system were designed to play in our society. Such victories have allowed corporations to steer plaintiffs out of courtrooms and into arbitration, where the odds can be stacked in favor of big business. The Court's recent arbitration decisions regarding the Federal Arbitration Act of 1925 ("FAA"), aggrandizing its reach and undermining the original purpose of the Seventh Amendment, are an example.

Protected by the Seventh Amendment, the civil jury has a dual role in the American constitutional

system. In its day-to-day role, the civil jury decides the facts and assigns fault in matters ranging from property disputes between neighbors to high-stakes lawsuits involving corporate behemoths. But that's not all it does.

The Founders had more in mind for this institution of government when they protected the civil jury in our Constitution's Bill of Rights. Alexis de Tocqueville observed that the jury should be understood as "one mode of popular sovereignty." Alexis de Tocqueville, *Democracy in America* 311 (Arthur Goldhammer trans., Penguin Putnam 2004). Jury service gives citizens direct exercise of an American constitutional power.

In a Constitution often dedicated to protecting the individual citizen against abuse of government power, the civil jury is the element of our constitutional system that is also dedicated to protecting citizens from abuse by private wealth and power. The Founders knew all too well the influence of moneyed elites, and left us the hard square corners of the jury box as a bastion against "the encroachments of the more powerful and wealthy citizens." 3 William Blackstone, Commentaries on the Laws of England 380 (1st ed. 1768).[2]

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[2] Political history can be viewed through the lens of a long struggle between powerful interests seeking to control the levers

of government and ordinary individuals seeking mostly to be left alone. *See, e.g.*, Niccolo Machiavelli, The Prince, ch. IX (1513) (speaking of "two distinct parties" in a governed society: one, "the nobles [who] wish to rule and oppress the people," and two, "the people [who] do not wish to be ruled nor oppressed by the nobles"); Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp (distinguishing between "the rich and powerful [who] too often bend the acts of government to their selfish purposes" and the "humble members of society — the farmers, mechanics, and laborers — who have neither the time nor the means of securing like favors to themselves"). The former desire to weaken bothersome institutional safeguards against corruption; the latter need the protection of those safeguards, even perhaps without knowing so. It is important that institutions of government recognize this perennial corruption hazard, and affirmatively protect against the persistent coopting of government by powerful and wealthy influencers.

In the past, this Court has taken this responsibility deadly seriously, and particularly has recognized the co-opting and corrupting tendencies of corporate power. *See Marshall* v. *Baltimore & Ohio Railroad Co.*, 57 U.S. 314, 335 (1853) ("Influences secretly urged under false and covert pretenses must necessarily operate deleteriously . . . . The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption[.]"); *Standard Oil Co. of New Jersey* v. *Lee*, 221 U.S. 1, 83 (1901) (Harlan, J., concurring in part and dissenting in part) (noting that in 1890, "the conviction was universal that the country was in real danger from another kind of slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country[.]"); *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) ("There was a sense of some insidious

Of course, one means of such encroachment by "the more powerful and wealthy citizens" is through corruption and abuse of government. In this sense, the civil jury's protection of the ordinary citizen against abuse by private actors supplements the various institutions protecting the ordinary citizen against abuses of government power. In a world in which unchecked special interest influence leads so plainly to corruption and abuse, the Founders set juries as the institution of government most resistant to political influence.

Against this historical and constitutional backdrop, the corporate campaign against the civil jury has an obvious motive: that "the more powerful and wealthy" should not have to suffer the indignity of a fair proceeding. In legislatures, platoons of lobbyists and floods of money (now both unlimited and anonymous) assure advantage for "the more powerful and wealthy." In the executive branch, phalanxes of lawyers and well-oiled revolving doors have for

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menace inherent in large aggregations of capital, particularly when held by corporations."); *see also Baltimore & Ohio Railroad*, 57 U.S. at 329 ("The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State.").

decades made agency capture a well-documented phenomenon giving advantage to "the more powerful and wealthy." Big influencers can become readily habituated to such advantage. It is a tragedy that, despite the extensive history and despite their obvious motive, this corporate campaign has succeeded, leaving so many Americans without redress, and virtually extirpating the civil jury from our American system of government.[3]

This should not be. The very annoyance of the "more powerful and wealthy" that they should be subjected to equality in the courtroom; the very intensity of their desire to divert conflicts away from juries to forums where their power and wealth gives them more advantage — these are predictable and positive attributes of the civil jury's role as the element of government designed to resist "the encroachments of the more powerful and wealthy citizens." These complaints are not a reason to assist in that diversion. This Court should not — now or

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[3] Since the 1930s, the number of jury trials has plunged precipitously, with less than two percent of federal civil cases and under one percent of state civil cases reaching a jury. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 524 (2012); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241, 1265 (2014) (discussing the startling statistics of diminishing jury trials and implications for their role in our political system).

ever — be a party to degrading a constitutional element of government just because that element's proper operation provokes yawps of complaint from "the more powerful and wealthy citizens" whose "encroachments" it was designed to restrain. To disable an element of our Constitution because it is *not* working would be a daring task indeed; to disable it because it *is* working would be anathema.

The Seventh Amendment is not the only element of our legal system under threat here: the Court's fundamental role as a neutral decision maker — as an impartial arbiter of law — is in question. Polls show Americans believe corporations enjoy advantage in this Court, by a margin of 7-1 over those who believe individuals enjoy advantage. *See* The Mellman Group, Inc., *Winning Messages: On Judges, Guns and Owning the Constitution's Text, History & Values* (Poll for the Constitutional Accountability Center) (Sept. 2017), https://www.theusconstitution.org/sites/default/files/-Mellman-CACConstitution-Poll September2017.pdf. That public perception seems founded in cases like this one, where in apparent contradiction of its own rules, the Court granted certiorari absent any circuit conflict on the central question presented and despite the lower courts' adherence to the clear text of the statute. *See* 6 Sup. Ct. R. 10.

Stacked atop the array of recent decisions that meticulously undermine the civil jury and allow

"powerful and wealthy citizens" to strip ordinary citizens of redress in court, this grant of certiorari has the same seeming inevitability as those 5-4 decisions in cases preceding it. Accordingly, *amicus* fears that the outcome of this case may be preordained — not by the FAA's plain language, but instead by the trajectory of the recent pattern of 5-4 partisan decisions (decisions in which the Court divides 5-4 with the Republican-appointed majority voting as a bloc). With numbingly predictable inevitability, these cases seem to be won by the "more powerful and wealthy" corporate citizens.

Against judicial doctrine that emphasizes the primacy of *text* in interpreting the laws of Congress, this case — and the incontrovertibly plain meaning of the FAA's saving clause — presents an easy test of the Court's commitment to that black-letter interpretive principle.

ARGUMENT

I. A Clear Policy Preference Has Emerged for Denying Citizens Their Day in Court.

Any fair reading of the Supreme Court's 5-4 jurisprudence in the past decade shows a distinct pattern of the "more powerful and wealthy" corporate interests gaining precedence over ordinary citizens. A pro-corporate policy bent has been particularly evident in the aggressive judicial expansion of the

Federal Arbitration Act of 1925 ("FAA"). The recent string of 5-4 arbitration decisions has provided the "more powerful and wealthy" interests an avenue to systematically deny ordinary individuals, such as those who are their employees or customers, access to juries of their peers when wronged. This was not what Congress intended when it enacted the FAA.

Congress passed the FAA "to place arbitration agreements upon the same footing as other contracts," *E.E.O.C.* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002), specifically in the context of *commercial* disputes. *See, e.g., Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J. dissenting) (citing 65 Cong. Rec. 11080 (1924)) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."). Looking at "the records of the deliberations in Congress" taking place during the years prior to the Act's passage, it is clear that there were serious questions about whether Congress intended to apply the FAA to "agreements affecting employment." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 126 (2001) (Stevens, J., dissenting). Likewise doubtful was Congress's intention to see the FAA applied to agreements between parties with "unequal bargaining power." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting); *see also id.* ("In

recent years, however, the Court 'has effectively rewritten the statute[.]'"); Judge Craig Smith & Judge Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 Tex. Tech L. Rev. 281, 287–88 (2012).

The early judicial expansion of the FAA began in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), when this Court ruled that consumers seeking to challenge the terms of their arbitration agreements could have their claim heard in court only if the claim challenged the enforceability of the arbitration clause itself. *See id.* at 403–04. Then, "[i]n 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a 'liberal federal policy favoring arbitration.'" *Epic Systems*, 138 S. Ct. at 1643 (Ginsburg, J., dissenting) (citing *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court further ballooned the statute in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), when it permitted arbitration clauses to be enforced in claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute.

But the greatest reach has come in the past decade. This Court, along consistent 5-4 partisan appointment lines, has rolled back plaintiffs' rights to plead their claims in court at a new and alarming clip.

In *Rent-A-Center* v. *Jackson*, 561 U.S. 63 (2010), the Court held 5-4 that would-be litigants could not bring a claim challenging an arbitration agreement as unconscionable — they would have to address the unfairness of the agreement before the very arbitrator they disputed. *See id.* at 69–72. Time will likely side with Justice Stevens in his dissent: "[c]ourts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator. . . . I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity." *Id.* at 85 (Stevens, J., dissenting). Surely Congress did not intend this result. Yet that is what the Court created.

Less than a year later, in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), the Court, 5-4, prevented consumers from bringing class-action suits against corporations for low-dollar, high-volume frauds. Ruling that the FAA preempted a state law prohibiting class action waivers in arbitration agreements, the Court left injured plaintiffs no alternative but to pursue individual arbitration claims. *See id.* at 346–49. The Court deprived individuals of their only economically viable way to pursue malefactors for low-dollar, high-volume frauds, leaving corporations free to pursue such practices unchecked by the threat of collective consumer action. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). *Concepcion* has

wrought havoc on the American consumer, insulating corporate wrongdoers from meaningful liability.

In *American Exp. Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013), the Court struck again, this time 5-3 (the 5 again being all the Republican appointees), dispensing with the rule — established by a long line of Supreme Court precedent — that contractual arbitration clauses are enforceable only if they permit individuals to effectively vindicate their rights. As Justice Kagan put it in dissent, the opinion was a "betrayal" of precedent. *Id.* at 240 (Kagan, J., dissenting). The effect was "to chok[e] off a plaintiff's ability to enforce congressionally created rights." *Id.* In dismissing that precedent, the majority "barely trie[d] to explain why it reache[d] a contrary result." *Id.*

And last term, *Epic Systems*, 138 S. Ct. 1612 (2018), another 5-4 partisan decision, further diminished employees' right to join their individual claims in the courtroom, allowing the FAA to swallow the National Labor Relations Act so that employment contracts can force employees to waive statutory labor rights.

* * * *

Beyond its infidelity to the text and purpose of the FAA, this Court's recent 5-4 arbitration jurisprudence flies in the face of the Seventh Amendment right to a jury trial. To English legal scholars, such as Sir

William Blackstone, the "trial by jury" was the "glory of the English Law." 3 William Blackstone, Commentaries on the Laws of England 379 (1st ed. 1768). Blackstone urged his readers to "guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which . . . may in time imperceptibly undermine this best preservative of English liberty." *Id.* at 381. In words that ring true today, he explained:

> [T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial . . . . This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.

Id. at 380. *Amicus* does not need to tell the Court how important Blackstone's Commentaries were to the lawyers of the founding generation.

History tells the same lesson. America's earliest settlers established trial by jury in the new colonies. *See* Stephen Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44

Hastings L.J. 579, 592 (1993) (citations omitted). Interference with the jury right was a *casus belli* of the Revolution. *See* The Declaration of Independence para. 20 (U.S. 1776) (decrying "depriving [the colonists] in many Cases, of the Benefits of Trial by Jury"). When the first draft of the Constitution was silent on the civil jury, Americans sounded the alarm and the Seventh Amendment was passed in the Bill of Rights — enshrining the civil jury right into the Constitution. Alexander Hamilton described the importance of juries in Federalist No. 83:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

Alexander Hamilton, *The Federalist No. 83*, at 499 (Clinton Rossiter ed., 1961).

Reverence for the civil jury continued well after ratification of the Seventh Amendment. Justice Joseph Story wrote that the Seventh Amendment is "most important and valuable" and "places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is

conceded by all to be essential to political and civil liberty." Joseph Story, 2 Commentaries on the Constitution of the United States 574 (The Lawbook Exch., Ltd. 2001) (3d ed. 1858). Chief Justice William Rehnquist later wrote: "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 343 (1979).

Reading the Court's FAA jurisprudence, it is as if none of this background existed. This Court's 5-4 partisan decisions have increasingly given our most "powerful and wealthy" entities new statutory tools to strip away this right from individual employees and customers, with nary even a mention of the Seventh Amendment, let alone any presumption in favor of American citizens getting their day in court.[4]

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[4] In fact, the Court has not considered the Seventh Amendment in its arbitration jurisprudence in more than *sixty* years — it last expressed concern in 1956 that moving people "from a court of law to an arbitration panel may make a radical difference in [the] ultimate result [as a]rbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment." *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956).

II. This Court Compromises Its Legitimacy When It Jettisons Neutral Principles to Reach a Desired Outcome.

There is nothing more essential to the legitimacy of the judiciary than its apolitical role in our constitutional system. Indeed, Chief Justice Roberts expressed concern last term about the Court's "status and integrity" if it were to continually adjudicate partisan disputes:

> If you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: 'Well, why did the Democrats win?' . . . It must be because the Supreme Court preferred the Democrats over the Republicans. . . . And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.

Gill v. *Whitford*, No. 16-1161, Oral Arg. Tr. at 37:18-38:11 (Oct. 3, 2017), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf.[5] But the perception of

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[5] This concern did not go unnoticed by commentators who closely follow the Court. *See, e.g.*, Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, N.Y. Times

the Court as an apolitical institution is already in doubt.[6]

To curb this erosion of confidence, *amicus* recommends that this Court renew its commitment to the neutral principles of adjudication that shield it from political bias.

(Oct. 26, 2017), *available at* https://www.nytimes.com/2017/10/26/opinion/politics-supremecourt-legitimacy.html; Lawrence Friedman, *John Roberts has tough job of keeping faith in Supreme Court*, The Hill (Oct. 26, 2017), *available at* http://thehill.com/opinion/judiciary/357392-john-roberts-has-task-of-keeping-americas-faith-in-supremecourt.

[6] A great many Americans believe that the Court is already politicized. *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 Pub. Op. Quarterly 105, 110, 112 (2012) (In a survey of 1,500 Americans, "[r]oughly 70 percent of the mass public either agrees or strongly agrees that the Supreme Court is 'too mixed up in politics' and 'favors some groups more than others,'" and "about 64 percent of the public believes the Court is 'sometimes politically motivated in its rulings.' . . . [A] significant share of the American public perceives of the Court in politicized terms."); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 Ann. Rev. L. & Soc. Sci. 201, 210–11 (2014) ("[P]ublic beliefs that justices decide cases on the basis of ideology, rather than law, raise a potential threat to the legitimacy of the institution. . . . [L]egitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.").

Principles of justiciability are a critical guardrail that keep the judiciary in its constitutionally prescribed lane. "[A] judge . . . is not [a] knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (Yale Univ. Press 1921). Such principles also provide necessary stability and predictability. Troublingly, this case's path to the Court may cause "the intelligent man on the street" to suspect there is something else going on beyond adherence to those neutral principles. This Court's practice is to withhold judgment unless important issues of federal law are so intractably difficult that lower courts are unable to reach the same result. That practice is enshrined in the Court's own rules, which provide that in considering a petition for certiorari, the Court hears cases where the decision below conflicts with another appellate court or a state supreme court. *See* 6 Sup. Ct. R. 10.

Yet here there is no conflict among the appellate circuits (or any lower courts) on the central question presented. The First Circuit is the first federal Court of Appeals to rule on whether the phrase "contracts of employment," as used in the FAA, should be given its plain meaning to encompass all agreements to perform work. There is no other appellate decision on the question. While this issue is currently pending before other circuits, there is no reason to believe that those courts will depart from the First Circuit's adherence to the FAA's clear text. This case has no

apparent business before the Supreme Court. But here we are.

Furthermore, the plain language of the statute would appear to resolve this case. The FAA prohibits courts from applying the statute to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Since the statute's inception, this text has been crystal clear: a transportation worker's agreement to perform work is exempted. The Court's inquiry should end there. "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

Neutral principles of judicial restraint and statutory interpretation provide an easy answer to this case. First, the case was improvidently granted because there is no circuit split. Second, a plain reading of the text dictates that two lower courts got it right. Departing from these self-evident conclusions would put the Court under both a burden of explanation and a cloud of suspicion.

CONCLUSION

For the foregoing reasons, and those in Respondent's brief, the Court should dismiss the case

as improvidently granted or affirm the First Circuit's decision.

Respectfully submitted,

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July 25, 2018